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No. 06-446

IN THE

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,

Petitioners,

v.

NITRO DISTRIBUTING, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF OF PETITIONERS

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RULE 29.6 STATEMENT

Petitioners incorporate the Rule 29.6 disclosure statement in their petition for a writ of certiorari.

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INTRODUCTION

When, as here, agreements clearly incorporate AAA and other nationwide arbitration rules that empower an arbitrator with *sole* authority to decide arbitrability, should a court applying the FAA presume that an arbitrator, not a court, is to decide those issues?

This is the question presented. Contrary to the entire thrust of respondents' brief, the issue is not *whether* a certain party is bound to arbitration. That question is secondary to the overriding one of *who* should so decide.

As the petition demonstrated, certiorari should be granted for at least three reasons. First, the decision below conflicts with the "majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006). A post-petition decision by the Federal Circuit makes this conflict even more stark. *See Qualcomm Inc. v. Nokia Corp.*, No. 2006-1317, 2006 WL 2988322 (Fed. Cir. Oct. 20, 2006).[1]

Second, while this "majority federal view" is grounded in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court has never resolved whether those cases are consistent with the requirement of actual consent to arbitration underlying the FAA and *First Options*.

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[1] In *Qualcomm*, the Federal Circuit concluded: "We agree with the Second Circuit's analysis in *Contec* and likewise conclude that [incorporation of the AAA Rules] . . . clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator." *Id.* at *5 (citing *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005)).

And third, the question presented is of great national importance because of the proliferation of contracts incorporating nationwide arbitrability rules. Indeed:

> The last two years alone have seen a significant increase in the number of courts accepting the incorporation argument when the rules of an arbitral forum such as the AAA have been referenced in an arbitration clause. The trend is significant for a number of reasons. It may be that the last two years have seen the first major [wave] of disputes since the AAA amended its rules to provide arbitrators with the jurisdiction to determine if disputes are arbitrable.

Joseph L. Franco, Comment, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of* First Options *in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443, 474-75 (2006).

In opposition, respondents cite decisions by "the First, Second, Eighth and Eleventh Circuits, and the Delaware Supreme Court" (Opp. at 2) while acknowledging that an "overwhelming majority of courts . . . have held that incorporation [of arbitration rules] by reference is sufficient." (*Id.* at 14.)[2] Respondents also recognize that the Supreme Court of Missouri itself answered all arbitrability questions without giving effect to incorporated AAA Rule 7(a) or JAMS Rule 11(c). Therefore, as discussed below,

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[2] Respondents cite the same cases identified in the petition. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989); *Contec*, 398 F.3d at 211; *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005); *James & Jackson*, 906 A.2d at 80.

respondents' brief underscores that certiorari should be granted because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." S. Ct. R. 10(b).

ARGUMENT

I. RESPONDENTS PROVIDE NO REASON TO DENY REVIEW

Petitioners' position is succinct. As argued below, arbitrators from the AAA or JAMS should decide the existence and scope of the respective arbitration agreements. Therefore, because the Supreme Court of Missouri clung to a rote assertion that a "court must determine" all issues of arbitrability (Pet. App. 4a), the decision below is wrongly decided and in conflict with decisions by federal courts of appeals applying *First Options*.

Respondents' position also is succinct – namely, the decision below is correct on the merits. While certainly entitled to this view, respondents' reading of the contracts does not cast doubt on the necessity of certiorari. When respondents do discuss why this Court should deny the petition (Opp. at 10-15), they provide three unpersuasive reasons.

A. The Question Presented is Not a "Non-Issue in This Case"

Respondents do not dispute that the agreements at issue fall within the FAA or deny that petitioners raised the question presented below. Instead, the crux of respondents' argument is that, "*having found no agreement to arbitrate*, the Missouri Supreme Court did not need to, and did not in fact, reach the issue of whether the parties agreed to let an arbitrator decide arbitrability." (Opp. at 7 (emphasis added).) Similarly, respondents assert: "*Given its finding that these*

parties never agreed to arbitrate in the first place, the Missouri Supreme Court had no occasion to reach the question of what their non-existent agreement may have provided . . ." (*Id.* at 3 (emphasis added).)

But, of course, these statements (and others like them in respondents' brief) beg the very question presented in the petition. As a result, respondents never grapple with the critical FAA issue of whether the arbitrator should be allowed to decide his or her own jurisdiction pursuant to incorporated arbitrability rules.

Respondents also assert (without citation) that "the Missouri Supreme Court had a duty to first determine whether the non-signatories made an arbitration agreement before it could compel arbitration on *any* issue." (*Id.* at 10 n.5.) This assertion seemingly is made without thought as to how it clashes with the long line of federal cases identified by both petitioners and respondents. (*See supra* note 2.) For example, as the Eleventh Circuit explained in *Terminix*:

> In the *ordinary* case, we would decide these questions [of arbitrability] only because they go to the validity of the arbitration clause itself, which is by default an issue for the court, not the arbitrator. Here, however, the parties have contracted around that default rule, and it is, therefore, unnecessary for us to reach these issues.

432 F.3d at 1333 (emphasis added).

Thus, in actuality, respondents make the case *for* granting certiorari. In their view, five federal courts of appeals and the Supreme Court of Delaware have erroneously decided an important issue of federal law in conflict with the Supreme Court of Missouri, as well as the Supreme Court of South Dakota. *See Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 436-37 (S.D. 2005).

B. The Question Presented is Not "Moot"

Similarly misguided is respondents' contention that the question presented is moot because one of the two respondents has been compelled to arbitrate its claims with certain petitioners. Clearly, however, the question about who should decide arbitrability is not moot simply because the Supreme Court of Missouri decided arbitrability.

Respondents' analysis reflects a faulty progression to an erroneous conclusion that starts with the alternative question presented on the opening page of their brief. According to respondents, the issue in this case is whether "a non-signatory 'clearly and unmistakably' agree[s] to let an arbitrator, rather than the court, determine the existence, scope and validity of a purported arbitration agreement even though that person never signed a writing . . . ." (Opp. at i.)

This framing of the issue obscures that there is no question that the agreements were signed by the principals of the corporate parties – the only question is whether these entities are bound by those signatures.[3] It also is misguided because it focuses on the quantum of evidence necessary to compel arbitration. It thus sidesteps the actual question: Who decides whether the evidence is sufficient? *See, e.g.*, Robert B. Davidson, *Arbitrability and the Non-Signatory*,

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[3] Also fatal to respondents' analysis is their failure to address the holdings in the leading decisions of the First Circuit in *Apollo* and the Second Circuit in *Contec*, both of which dealt with "non-signatories" to an agreement. (Pet. at 12-14.) "Under the reasoning of *Apollo*, whether the arbitration rights under the [agreement] were validly assigned . . . is an issue that pertains directly to the continued 'existence, scope or validity' of the Agreement. As such, it is within the jurisdiction of the arbitrator pursuant to AAA Rule R-7(a) as incorporated into the 1999 Agreement." *Contec*, 398 F.3d at 210.

6/20/2005 N.Y.L.J. S6, (col. 1) ("Courts have now begun to focus not only upon whether a non-signatory can be compelled to arbitrate . . . but who should decide this gateway issue, a court or an arbitrator.").

C. A "True Conflict" Exists

Although their third and final argument is that "petitioners have not shown a true conflict," respondents admit that a conflict exists with the Supreme Court of South Dakota's decision in *Flandreau*. (Opp. at 14.) As demonstrated in the petition, both *Flandreau* and the decision below are in conflict with what two recent commentators call "the general trend . . . to interpret broad arbitration clauses consistent with the general policy favoring arbitration and to relegate to the arbitrator all questions of arbitrability." Michael A. Geibelson & Bernice Conn, *Clause and Effect: Parties Agreeing to Standard Arbitration Clauses May Unwittingly Alter Their Rights*, 29 Los Angeles Lawyer 35, 36-37 (2006).

Respondents' own analysis illustrates why a true conflict exists. Accordingly, it is wrong to describe *Flandreau* as a "single aberration." (Opp. at 14.)

It is wishful thinking for respondents to suggest that the decision below does not conflict with the federal circuit cases addressing the question presented. It could not be clearer that the Supreme Court of Missouri refused to give effect to the same incorporated arbitrability rules that those courts held must be given effect under the FAA.

II. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS SIGNIFICANT PRACTICAL CONSEQUENCES

"*First Options* has been justifiably criticized for failing to state just how 'clear and unmistakable' the waiver of the judicial access right needs to be, and how such waiver is to be manifest." Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. Rev. 819, 866 (2003). In particular, as noted in the petition, *First Options* did not consider whether the incorporation of an extrinsic expression of the intent to arbitrate the existence or validity of the agreement would meet its "clear and unmistakable" standard.

Without answering the question presented here, decisions by this Court since *First Options* have encouraged the use of arbitrations and thereby caused the question to arise with greater frequency. For example, *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006), "has been viewed as a firmly pro-arbitration decision, and one in a long line of Supreme Court decisions supporting the use of arbitration to resolve a wide range of disputes." William K. Slate II, *2005 President's Letter* at 1 (AAA). Consequently, as a law professor has observed:

> Traditionally, entities with relatively equal bargaining power used arbitration primarily in specialized industries. In the past ten to twenty years, however, arbitration has gained acceptance in other areas, notably proliferating as a result of mandatory predispute and form arbitration contracts between corporate entities and their customers, patients, or employees. As the use of arbitration has increased, the need for arbitration services has correspondingly risen and spawned a market for professional private

> arbitrators and an industry of private businesses that provide arbitration support and administrative services (provider institutions).

Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 Minn. L. Rev. 449, 449 (2004) (footnotes omitted).

Respondents do not dispute the increased use of arbitration agreements in recent years. Nor do respondents dispute the widespread use of nationwide arbitration providers such as the AAA or JAMS. Thus, respondents cannot seriously dispute the broad impact this Court's clarification of *First Options* would have across the country.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

In the final analysis, this case is a superb opportunity for the Court to decide the important FAA question presented. There is no dispute that the case presents three different arbitration agreements, two sets of arbitration rules, and a variety of individual and corporate parties. Accordingly, petitioners urge the Court to grant certiorari on the important, frequently recurring question of whether the FAA's default allocation of authority between courts and arbitrators presumptively is altered when an agreement incorporates nationwide arbitration rules, adopted by the American Arbitration Association and similar well-respected arbitration organizations, providing the arbitrator with sole authority to determine the "existence," "scope," and "validity" of the agreement.

CONCLUSION

For the reasons set forth in the petition and this reply, the the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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